SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/07/2000

CLERK OF THE COURT
FORM R000A

HONORABLE DAVID R. COLE

D. Sauerzopf
Deputy

CR 1999-001440

FILED: _____

STATE OF/ARIZONA

RICHARD L/NOTHWEHR
KENNETH N/VICK
KATHLEEN L/WIENEKE

v.

ROBERT TORRES/MORENO

C DANIEL/CARRION
W CLIFFORD/GIRARD JR
CHRISTOPHER G/MCBRIDE
JOSEPH E/ABODEELY
ANTONIO R/ZUNIGA

MINUTE ENTRY

I. Background

Defendants seek an order disqualifying the Office of the Maricopa County Attorney ("MCAO") from representing the State of Arizona in connection with all further proceedings in the consolidated case and their individual cases. MCAO opposes the request. The Court convened an evidentiary hearing on October 12, 1999. After the parties filed their post-hearing pleadings, Arizona Department of Public Safety ("DPS") personnel discovered certain previously-undisclosed documents that required the Court to schedule a supplemental evidentiary hearing. That hearing took place on December 21, 1999. The Court permitted both sides to file supplemental memoranda based on the evidence adduced on December 21, 1999. Three supplemental memoranda (two from the defense and one from MCAO) were filed January 4, 2000.

The Court has considered all relevant pleadings, numerous deposition transcripts, the transcript and notes from the evidentiary hearings, the exhibits introduced on October 12, November 17, November 30, and December

21, 1999, applicable provisions of the Arizona Rules of Professional Conduct, and the relevant case law.

II. The Claim

Defendants urge that disqualification is required because MCAO prosecutors have a conflict of interest; i.e., they cannot simultaneously (1)represent the State in these DUI prosecutions, and (2) defend/justify their own conduct as it relates to the Intoxilyzer 5000 and the information that is derived from tests administered utilizing that instrument.

III. Summary of the Evidence

In 1995, 1996, and 1997, personnel from DPS, MCAO, and other agencies met on several occasions for the purpose of discussing, among other things, "ACJIS" (Arizona Criminal Justice Information System), "ADAMS" (Alcohol Data Acquisition Management System), and various changes that were going to occur concerning management of data derived from breath testing. Different people attended the various meetings; at least one prosecutor from an agency other than MCAO attended each meeting. It is clear that MCAO prosecutors did more than simply attend these meetings; several were active participants in the discussions.

"ADAMS" was designed to provide quality assurance in the administration of breath tests. Within a short time after the first "ADAMS" instrument was put in place in December 1994, it became necessary to make certain decisions concerning data management. No MCAO personnel were involved in the design of either ADAMS or ACJIS, nor did any such individual participate in the design or implementation of the "filters" that were built into ADAMS.

Several former and current deputies county attorney testified that, had they known about the possible concealment, deletion, or destruction of information that is subject to disclosure pursuant to Rule 15, Ariz.R.Crim.P., and/or Brady v. Maryland, 373 U.S. 83 (1963), they would have taken action consistent with their ethical and legal obligations. At least one prosecutor testified that, when a question arose concerning the deletion of information, he and other prosecutors were assured by DPS personnel that all data would be preserved by way of a "backup" system.

IV. The Law

In Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984), our supreme court made the following statement:

> Only in extreme circumstances should a party to a lawsuit be allowed to interfere with the attorney-client relationship of his opponent.

141 Ariz. at 161, 685 P.2d at 1313 (citations omitted). The court went on to note that the burden rests with the party seeking disqualification of counsel. The court suggested that trial judges consider the following factors in determining whether, in a particular case, the "appearance of impropriety" warrants disqualification: (1) whether the motion is made for the purposes of harassing the opponent; (2) whether the moving party will be damaged if the motion is denied; (3) whether viable solutions less drastic than disqualification exist; and (4) "whether the possibility of public suspicion will outweigh any benefits that might accrue due to continued representation." 141 Ariz. at 165, 685 P.2d at 1317.

Two years later, in Gomez v. Superior Court In & For Pinal County, 149 Ariz. 223, 226, 717 P.2d 902, 905 (1986), the court noted that it viewed requests for disqualification based upon conflict of interest or appearance of impropriety "with suspicion." The court then reiterated the factors it identified in Alexander.

It is impermissible to call a prosecutor as a witness as a means of disqualifying him from further involvement "where the testimony, although relevant, is merely cumulative and not necessary to the defense of the case." State v. Bishop, 118 Ariz. 263, 266, 576 P.2d 122, 125 (1978)(citations omitted).

V. Discussion

A. Evaluation of Alexander Factors

1. Is this motion made for the purpose of harassment? No.

2. Will the defendants be damaged if the motion is denied? No.

3. What solutions short of disqualification exist?

MCAO urges that screening mechanisms such as have been utilized in other cases can be

implemented here. The Court is not persuaded that, under these somewhat unique circumstances, any such mechanism is necessary or viable.

4. Will "public suspicion" that may result from an order denying disqualification outweigh any benefits that might be reaped from MCAO's continued involvement?

Because it requires the Court to attempt to "predict the unpredictable," this is the most difficult of the four factors to evaluate. It is not beyond the realm of possibility that some suspicion will be aroused regardless of how this motion is resolved. The guidance provided by Alexander as it relates to this issue militates against an order disqualifying MCAO. As in Alexander, there is a basis for inferring that the defendants urge disqualification, at least in part, for tactical reasons. The very real possibility that such a motive exists within the context of a particular lawsuit is one reason the Gomez court observed that motions for disqualification should be viewed with suspicion. Furthermore, although it is probably more inappropriate for the State to have the opportunity to "select or reject" who will represent a criminal defendant than to afford a defendant the ability to reject State's counsel, the latter conveys the same "distasteful impression" expressed by the court in Alexander. 141 Ariz. at 165, 685 P.2d at 1317.

With respect to the benefits that will accrue by reason of MCAO's continued participation, and without denigrating other prosecutorial agencies, it is well-known that MCAO maintains a cadre of lawyers who are trained and experienced DUI prosecutors. MCAO has been involved in these cases for a considerable period of time. It seems clear that substantial resources can be preserved and further delay avoided (or at least significantly ameliorated) if MCAO is permitted to continue as State's counsel.

The Court concludes that an order disqualifying the MCAO will generate as much or more suspicion than an order denying disqualification. Even if that were not so, it appears that the benefits of permitting MCAO to continue to represent the State in these matters would outweigh any suspicion that might be aroused by reason of an order denying the motion to disqualify.

B. Other Considerations

Certain other aspects of defendants' claim merit brief discussion. First, the Court rejects any suggestion that the substantive issues presented by the consolidated and individual cases cannot be fully and fairly litigated without calling MCAO prosecutors as witnesses. Second, as MCAO points out, a conflict in the **testimony** as it relates to matters such as (1) who attended which meeting, and (2) what topics were discussed during a particular meeting does not compel the conclusion that a conflict of **interest** lurks. Third, the notion that an "I don't know" response evidences chicanery or some kind of prosecutorial conspiracy to circumvent the rules of ethics and/or discovery-related obligations borders on the absurd. The events in question took place several years ago. It should surprise no one that the witnesses do not have total recall of the kinds of details into which inquiry has been made.

VI. Conclusion and Orders

The burden is on the defendants to show either a conflict of interest or an "appearance of impropriety" of such substantial and notorious nature that continued prosecution of these cases by MCAO cannot be permitted. This case does not present the kind of "extreme circumstances" that must exist before disqualification is warranted. Defendants' burden is a heavy one which, in the Court's judgment, they have failed to carry. Therefore,

IT IS ORDERED denying the Motion to Disqualify the County Attorney's Office.

IT IS FURTHER ORDERED scheduling a status conference for January 20, 2000, at 1:15 p.m. (15 minutes allotted).

IT IS FURTHER ORDERED that counsel confer before the status conference and attempt to reach agreement concerning the method by which the substantive issues will be brought before the Court.